Supreme Court, U.S.
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No. 88-163

In The

Supreme Court of the United States

October Term, 1988

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COMBUSTION ENGINEERING, INC., *et al.*,
Petitioners,

v.

ARSENIO C. SAPORITO, *et al.*,
Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

REPLY BRIEF FOR PETITIONERS

—o—

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REASONS FOR GRANTING THE WRIT

In respondents' opposition to the within petition for a writ of certiorari, they assert that this matter concerns only the scope of § 510 of ERISA, 29 U.S.C. § 1140 (1982), and not the statutory definition of "participant" under § 3(7), 29 U.S.C. § 1002(7) (1982).[1] Respondents contend that "[t]his case is simply not one that addresses the question of 'participant' status . . .". (Opposition Br., p. 2). This is simply not true. Any case that involves the question of standing under ERISA § 502(a), 29 U.S.C. § 1132(a) (1982)—as this case clearly does—also involves the question of participant status, since only participants have standing to sue under ERISA. Therefore, the central issue presented here is whether respondents—retired employees—were participants in VSIP with standing to sue for alleged interference with their rights under that plan.

Respondents further contend that "the Court of Appeals here did not address the issue of the definition of participant, but instead ruled that respondents have standing under [§ 510] to show that they would have been participants . . .". (Opposition Br., pp. 3-4) (footnotes omitted). Again, respondents miss the point. By concluding that respondents—the "would have been" participants—have standing, the court below expanded both the standing requirement and the statutory definition of participant.

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[1]The statute narrowly defines participant as any employee or former employee "who is or may become eligible to receive a benefit" from the plan in question. Respondents and the court below improperly seek to expand this definition to include former employees who "would have been" or might have been eligible, but who otherwise were clearly not eligible to receive such benefits.

Under the court's theory, former employees who have no reasonable claim of eligibility to receive benefits nonetheless have standing—i.e., are participants—to try to establish how they could have become eligible. (16a). The holding in *Firestone Rubber and Tire Co. v. Bruch*, 828 F.2d 134 (3d Cir. 1987), cert. granted, — U.S. —, 108 S.Ct. 1288 (1988), is virtually identical.

Finally, respondents suggest that the statutory standing requirement—and the definition of participant—is somehow different in this case from *Bruch* because the cause of action here concerns § 510. (Opposition Br., p. 3). There is no basis for this contention.

Respondents—and the court below—choose to ignore the fact that the retired respondents could never be "participants" in the VSIP plan, which was first offered after they retired, since they could never become eligible for benefits under that plan, and they therefore have no standing under ERISA to sue for VSIP benefits or anything else related to that plan. *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983). This lack of standing is exactly the same whether their cause of action is for an alleged breach of § 510, or for information under § 104, 29 U.S.C. § 1024, as in *Bruch*, or for any other remedy under ERISA. *Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476-477 (2d Cir. 1985).

Had Congress intended to allow individuals such as respondents here—or the former employees in *Bruch*—to have standing to sue under ERISA, it would not have so narrowly defined "participant" in § 3(7), or limited standing to participants as so defined. Significantly, there is

no "would have been" in the statutory definition of either participant or standing, since, as here and in *Bruch,* such an expansive definition would simply invite ERISA litigation from anyone who merely *claims* or *alleges* that they "would have been" participants—that they would have remained employed—had they only known that there would be more attractive benefits available sometime in the future. Such claims are premised on the pure speculation that an individual "would have been" a participant in a plan offered months or even years after his/her retirement.

Because this Court has granted certiorari in *Bruch* to review the Third Circuit's expansive definition of "participant" under ERISA, and the conflict thereby created among the circuits, and because the instant petition presents the virtually identical issue from the same court, petitioners respectfully request that their petition for a writ of certiorari be granted and that the matter be resolved in light of and in accord with the disposition reached in *Bruch.*

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari previously filed, it is respectfully requested that the Court grant certiorari in this matter.

Respectfully submitted,

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